

CHAPTER 40B TASK FORCE
MARCH 6, 2003

Commission Members:

Jane Wallis Gumble	Task Force Chair, Director, DHCD
Fred Habib	Facilitator, Non-Voting member, Deputy Director, DHCD
Mark Bobrowski (<i>Absent</i>)	Municipal Consultant, Professor, New England School of Law
Senator Harriette Chandler	Senate Chair, HUD Committee
Jack Clarke	Director of Advocacy, Massachusetts Audubon Society
Howard Cohen	Board Member, Citizens Housing & Planning Association
Representative Michael Coppola	Massachusetts House of Representatives
Marc Draisen (<i>Absent</i>)	Executive Director, Metropolitan Area Planning Council
Steve Dubuque	President, Massachusetts Non-Profit Housing Association
Representative Robert Fennell	House Chair, HUD Committee
Thomas Gleason	Executive Director, MassHousing
Bennet Heart	Attorney, Conservation Law Foundation
Representative Kevin Honan	House Chair, HUD Committee
Michael Jaillet (<i>Absent</i>)	MMA Housing Subcommittee
Al Lima	Planning Director, City of Marlborough
Bill McLaughlin	President, Rental Housing Association of the GBREB
Kathleen O'Donnell	Attorney, Kopelman & Paige
Gwen Pelletier	Board Member, Massachusetts Association of CDC's
Mayor Sharon Pollard	City of Methuen
Jeff Rhuda	Homebuilders Association of Massachusetts
Representative Harriett Stanley	Massachusetts House of Representatives
Senator Bruce Tarr	HUD Committee
Senator Susan Tucker	HUD Committee
Senator Diane Wilkerson	Massachusetts Senate
Clark Ziegler	Executive Director, Massachusetts Housing Partnership

Attendees:

Judith Alland	MAPC
Arthur Bergeron	Attorney
Roger Blood	Brookline Housing Advisory Board
Joy Conway	GBREB
Marilyn Contreas	DHCD
Lynn Duncan	Town of Wilmington
Elizabeth Dillan	HUD Committee
Matt Feher	MMA
Ben Fierro	Lynch & Fierro, LLP
Rebecca Frawley	DHCD
Anne Marie Gaertner	DHCD
Aaron Gornstein	CHAPA
Fred Habib	DHCD
Lincoln Heineman	Office of Representative Hynes
Ronald Marlow	Office of Senator Wilkenson
Nancy McDonald	MassHousing

Matt Moran	Office of Senator Knapik
Chris Norris	CHAPA
Kristen Olsen	DHCD
Todd Prussman	Office of Representative Stanley
Bob Ruzzo	MassHousing
Anne Tate	Office for Commonwealth Development
Anna Waclawiczek	Office of Representative Fennell
Jon Witten	Horsley & Witten, Inc.
Sarah B. Young	DHCD
Juanita Zerda	DHCD

Materials Distributed:

Task Force Member List

Task Force Meeting Schedule

List of Bills Proposing Changes to Chapter 40B

Planned Production Guidelines

Notes to the Subsidized Housing Inventory

Chapter 40B Regulations (Blue Book)

Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity

Introductory Remarks:

Jane Wallis Gumble, Director of DHCD and Chair of the Chapter 40B Task Force, brought the meeting to order shortly after 10:00 AM. Ms. Gumble welcomed the Task Force members as well as those in attendance in the audience. She noted according to Governor Romney, the mission of the task force is to improve 40B, not to eliminate it. She then introduced Doug Foy, Chief of the Office for Commonwealth Development.

Mr. Foy noted he was looking forward to the recommendations of the Task Force and that he hoped to see innovative ideas on how to make 40B more powerful and successful in the framework of the administration's goal of doubling housing starts. He acknowledged that the group had a significant task before it, and that it would require a substantial commitment from the members. He added that if he or Governor Romney could provide any assistance, they would be happy to provide it. He noted his confidence in Ms. Gumble's ability to make this successful.

Fred Habib (facilitator), Deputy Director of DHCD introduced himself and proceeded to review the materials that had been distributed to Task Force members. He then asked the Task Force members as well as members of the audience to introduce themselves. After the introductions, Mr. Habib noted that DHCD staff Anne Marie Gaertner, Bill Reyelt, Marilyn Contreas, and Kristen Olsen would be facilitating activities of the Task Force. Mr. Habib noted that DHCD intended to distribute materials to anyone who was interested and that the most efficient method would be via email. He designated Anne Marie Gaertner, Senior Policy Advisor for DHCD, as The Task Force's single point of contact for anyone wishing to receive or distribute information, and requested that in the future people contact her via email or phone at: anne.marie.gaertner@ocd.state.ma.us or (617) 727-7765 ext. 128.

Mr. Habib then discussed some general rules of conduct for the Task Force. He noted the importance of keeping the meetings free-flowing and asked that people restrict their comments to 2-3 minutes and avoid speech making. He reiterated the willingness of DHCD to distribute information/materials at any meeting and noted that minutes from Task Force meetings would be distributed within 4 business days.

Mr. Habib briefly reviewed the purpose of the Task Force, noting the following four key tasks:

1. Reaffirm the need to increase the supply of housing, a portion of which should be affordable to households earning less than 80% of the area median income.
2. Assess the effectiveness of the 40B statute to address the aforementioned need.
3. Identify the impacts created by 40B and determine whether they are commensurate with the public benefit.
4. Propose modifications that would mitigate harmful impacts or that would improve the effectiveness of 40B.

In order to provide the members of the Task Force with the same basic level of knowledge of 40B, Mr. Habib asked that Clark Ziegler, Executive Director of the Massachusetts Housing Partnership provide a history of 40B and Anne Marie Gaertner provide an overview of the recent regulatory changes made to 40B.

History of 40B

Mr. Ziegler noted that 40B was enacted 1969 as a result of a legislative commission that had studied unmet housing needs in Massachusetts. He explained that in its first decade (1970s), 40B produced relatively few projects and controversies, which he attributed to a weak economy and reductions in federal housing assistance programs. He also noted that during this time period communities and developers were learning how the process worked.

Mr. Ziegler pointed out that in the early 1980s increased market growth coupled with two new state programs, e.g. Homeownership Opportunity Program (HOP) & State Housing Rental Assistance Program (SHARP), led to more 40B proposals and more controversy. Starting in 1985/1986 there was tremendous market growth, credit was readily available for developers, state government was supporting the development of mixed income housing, and a lot of housing was built outside of the cities. He noted that at this point 40B became most controversial, and that as towns were facing a lot of growth pressure in general, 40B became a lightning rod for their frustration. He explained that during this time the state was encouraging towns to take the lead, to be proactive and set local priorities and identify land appropriate for affordable housing. This, he noted, created a tension between communities trying to control their own destiny and the unmet market demand. There was a great deal of concern expressed by communities about coping with 40B developments. The Legislature sought to preserve 40B while addressing the concerns of the communities.

In 1987, a Special Commission to Study 40B was established and they had meetings throughout the state to see what 40B was accomplishing and what its problems were. The Commission issued a report in April of 1989 with the following three key recommendations:

1. subsidy definition should include actions taken by local government to build affordable housing.
2. emphasize "good faith" and planning efforts of the communities to provide housing
3. create climate of more support for local efforts, provide technical assistance.

Mr. Ziegler noted that the recommendations in the Commission's report were implemented early in 1990, but by that point the real estate market was in "freefall" and the provision of the law relating to local housing planning was not being used. By the late 1990's the same pressures returned with a fast growing housing market and the introduction of the New England Fund subsidy program. Towns were once again overwhelmed. He then asked Anne Marie Gaertner to discuss the regulatory changes to 40B that have been implemented since March 2001.

Recent Regulatory Changes to 40B:

Ms. Gaertner noted that the recent increase in 40B applications could be attributed to the state of the real estate market and the introduction of new funding sources. Ms. Gaertner noted that there have been three rounds of regulatory changes, and proceeded to review

the details of the regulatory changes as outlined in the attached handout titled “Summary of Recent 40B Regulatory Changes.”

Ms. Gaertner was asked if there was anything in the Omnibus Housing Bill that was not incorporated by DHCD's regulatory changes. She responded saying that everything from the Omnibus Housing Bill had been incorporated, though there were some minor technical changes made at then Governor Jane Swift's request.

Jon Witten noted that communities had expressed concern that MassHousing would not be a stringent gatekeeper as the new project administrator of the New England Fund, and asked how many applications MassHousing received for project eligibility letters and how many they had denied.

Tom Gleason, Executive Director of MassHousing, responded stating that though he did not have the numbers with him, he could say that the majority of requests were approved. He indicated that those that are rejected are rejected because they are “grossly inappropriate” for housing, and that the site approval letter sets the stage for local negotiation of a project, and is not the “final arbiter” of a project. Howard Cohen also noted that as somebody who has received a number of site approval letters from MassHousing, most of them included conditions to mitigate the impacts of housing.

Different Perspectives: Communities, Neighbors, and Developers:

Senator Wilkerson expressed the need to hear from cities and towns, as well as developers, on how they “walk through” the process. She sees this as critical to determine what the problems are, and what appears to be working. She also expressed concerns about how this group would report and make recommendations. She asked if the group would work by consensus or voting, and urged that the group take up this question fairly early in the process.

Mr. Habib asked the group to indicate topics for presentations that would be useful.

Representative Michael Coppola noted that the infrastructure (water, sewer, services, schools and wetlands) of fast growing communities is most impacted by 40B projects. He added that communities struggling to meet the demand of strong growth are frustrated when 40B projects are “dumped” on them and the ZBAs won't set conditions because they believe the Housing Appeals Committee favors developers and will overturn town decisions.

Ms. Gumble interjected noting that the statistics show that this perception of the Housing Appeals Committee is a myth. She added that an independent analysis of 40B over the past 30 years found that similar percentages of Housing Appeals Committee decisions were in favor of communities and developers, and that a large number of cases have been settled to the parties' satisfaction or withdrawn. Ms. Gumble added that this research, prepared by Bonnie Heudorfer, would be presented at the next meeting. She hoped Ms. Heudorfer's findings would help people to understand the reality of the process and what 40B has accomplished.

Attorney Kathleen O'Donnell of Kopelman & Paige, noted she has worked with several communities on the South Shore on 40B projects, and volunteered to put together an overview of the process, adding that it is expensive and time-consuming for communities.

Mayor Sharon Pollard briefly shared Methuen's experiences with 40B proposals, noting that cities and towns feel that self-determination, community character, quality of life, and open space are threatened by 40B. Mayor Pollard noted that taking commercial land for affordable housing 'zaps' the tax base, and the state's building assistance fund constrains the ability to build new schools. Mayor Pollard suggested making 40B more workable for communities.

It was agreed that Attorney Kathleen O'Donnell, Mayor Pollard, and Al Lima would coordinate a "walk through" of the 40B process from the community perspective.

It was suggested that a presentation of the mechanics of 40B from the developer's perspective be made at the next meeting as well. It was agreed that Jeff Rhuda, Bill McLaughlin, and Gwen Pelletier would provide the "walk through" from the developer's perspective.

Mr. Witten suggested that the committee should also hear from the neighbors/abutters of 40B proposals.

Mr. Habib proposed that one representative from a neighborhood group speak to the committee at the next meeting and work with Kathleen O'Donnell of the community perspective group. Mr. Witten said that he is working with several and that he would be able to represent their concerns.

Bill McLaughlin, President, Rental Housing Association of the GBREB suggested that a tour of existing 40B sites would be helpful.

Mr. Gleason requested that those who were putting together "walk through" presentations of the process identify the components of a successful process. He noted that as much as we want to talk about the problems, there has been a lot of great housing built under 40B. He added that very few complaints are made once the housing is built.

Senator Wilkerson noted that she had requested the "walk through" presentations because of the need to identify what is real and what is perception. Senator Wilkerson also noted the need for communities to take responsibility for addressing the needs of the Commonwealth. She added that a fragile housing market is not good for the economy.

Legislative Review:

Jack Clarke, Director of Advocacy for the Massachusetts Audubon Society, suggested that everyone read the 68 bills that have already been proposed.

Attorney Bennet Heart of the Conservation Law Foundation suggested that somebody put together a summary of the 68 bills currently proposed, noting that some may be duplicative of each other, and that some may have already been incorporated by DHCD regulations. Mr. Habib requested that Steve Carvalho, Legislative Director of the Office

of Intergovernmental and Legislative Affairs, Aaron Gornstein, Executive Director of CHAPA, and HUD Committee staff present a summary of the bills proposing changes to 40B. Mr. Carvalho, and Mr. Gornstein agreed.

Housing Need:

Attorney Bennet Heart expressed his concerns about the unintended consequences of 40B, and specifically asked if there were many housing units that satisfy 40B in all respects except that they don't have a subsidy. He was concerned that this would discourage communities from pursuing affordable housing projects because they don't have subsidy.

Mr. Habib suggested that DHCD could try to assemble census data on affordable housing in communities in Massachusetts to address Mr. Heart's concerns about existing non-subsidized affordable housing.

Senator Harriette Chandler asked how many communities have housing plans and what resources are available to help towns move forward.

Mr. Habib responded to Senator Chandler, noting that Executive Order 418 provides planning and consulting services to create community development plans and that 250 communities are participating in the program.

Mr. Heart suggested that the Task Force reserve some time to take a regional or statewide look at growth patterns and smart growth principles. He suggested that the Task Force consider where they wanted to foster development, and the financial incentives that could be used towards that goal. He noted that many states use smart growth principals in administering Low Income Housing Tax Credit (LIHTC) programs, and suggested that DHCD look into that as well. He expressed his belief that it is incumbent upon the Task Force to look at smart growth principles to improve 40B.

Senator Bruce Tarr suggested reviewing the build-out analyses from EOEA to identify communities with capacity as well as those that have been built-out. Senator Tarr proposed that the crisis in this state is that often the people who do make higher incomes can't find a place to live. He noted that companies can't recruit employees because of housing stock issues and that the Task Force should look at the segmentation of the housing need in light of the McMansions that are currently being built.

Local Initiatives:

Steve Dubuque, President of Massachusetts Non-Profit Housing Association, noted that many projects are now initiated at the local level, and that communities are now talking about affordable housing for the first time in many years. He asked people to make suggestions on how to increase supply.

Attorney Kathleen O'Donnell suggested that communities use Community Preservation Act funds to buy property and place affordable housing deed restrictions on it, as well as provide tax title land to developers or non-profits to create affordable housing.

Mr. Ziegler noted that MHP has encouraged towns to provide affordable housing without 40B, and volunteered to do a presentation on the types of affordable housing projects that towns have done on their own. He added that the process for these community initiatives can be slow, but the results are great.

Barriers to Development:

Senator Tarr suggested that the group discuss other barriers to development, such as the cost of land and the cost of litigation. He noted his concerns that the amount of money that has been invested in confrontations over 40B proposals could have been used to build much more affordable housing than has actually been built under 40B. He then suggested that the group ask developers what would help them to build housing besides 40B, noting that it could be useful to explore another path.

Howard Cohen, Board member of CHAPA, indicated that he would like to speak to cost of confrontation. He noted that in his experience, any development that is proposed is being opposed. He noted that the school issue is everywhere, and that communities don't want kids because they can't afford them. He then asked, 'Where should they go?' He noted that the 75% of the units in 40B projects that are market rate are rented-up instantly because there is such a demand. He added that Massachusetts has had a dramatic "down-zoning" in past years, and that there is very little multi-family zoning. He noted that there is some data from one of the think tanks that suggests Massachusetts has increased the cost of housing by 30-40% due to land use practices. He added that we are pushing out the people the state needs most - college graduates.

Jeff Rhuda of the Homebuilders Association of Massachusetts suggested that the real problem is not 40B, but the misuse of 40A. He added that in his experience as a developer, he has appeared before many communities and there has been tremendous pressure from abutters not to build at all, regardless of the type of housing (40B or traditional subdivision). He also noted that Massachusetts is ranked 47th in the nation in issuance of building permits per capita.

Mr. McLaughlin suggested that the Task Force study the actual impacts of rental and ownership housing built under 40B, and specifically, the number of school aged-children that are really in these developments and the actual impacts on sewer/water.

Senator Wilkerson noted that developers could only build either subsidized or high-end housing because of the cost of development, which she attributed to the use of zoning by cities and towns to prevent growth.

Representative Michael Coppola added that the Commonwealth of Massachusetts is very protective of wetlands, water resources, and Title V, and noted that all these things add to the time and cost of permitting.

Mr. Rhuda noted that 40B does not allow you to override any state regulations, including Title V. Mr. Rhuda then compared zoning books to cookbooks for developers, telling them what and where they can build. He explained that Ch. 40B simply changed the cookbooks.

Mr. McLaughlin noted that most of the larger 40B developments that are privately subsidized do not receive a dollar from the state, rather MassHousing provides a loan which developers repay, and the market rate units subsidize the below-market units.

Mr. Gleason agreed that most large 40B developments are internally subsidized, but that the root source of the subsidy is the community via density bonuses. He noted the questions the Task Force needs to ask are “How do we get housing built faster?” and “What do communities need to get this done?” He added that subsidies come and go, but the density bonuses from the communities will always be the greatest subsidy.

Some Task Force members expressed an interest in conducting site visits of 40B developments. At this time no site visits have been scheduled. DHCD will post photographs and distribute CHAPA’s publication “The Homes of 40B”, which will illustrate and describe 40B developments for the Task Force members.

For 3/18 /03 Meeting:

Mr. Habib then summarized the presentations for the next meeting. They are as follows:

- Housing Market Picture: DHCD
- Presentation of the process from the community perspective: Attorney Kathleen O’Donnell, Mayor Pollard and Al Lima
- Presentation of the process from the developer perspective: Bill McLaughlin, Jeff Rhuda, and Gwen Pelletier
- Legislative Briefing: Steve Carvalho, Aaron Gornstein, HUD Committee staff
- Analysis of what 40B has built: Bonnie Heudorfer

Closing Remarks:

Ms. Gumble thanked everyone for agreeing to serve on the Task Force, and noted that they had quite a job ahead, but if anyone could do it, this group could. She went on to say that she found it very encouraging that people are not opposed to mixed-income housing in general, but just how to build it.

Summary:

The following list is a summary of issues initially identified by the Task Force members that will be examined at future meetings:

- Cost of land
- Cost incurred prior to permitting (communities and developers)
- What is the role of the private market?
- What is our affordable supply?
- Current land use law (40A) "being abused"
- Extent of regulation at local level adds to cost of housing/ prohibits housing from being built
- Both local and state regulation perceived by some as too stringent (environmental) (noted that 40B cannot override state environmental regulations of DEP, but can override local zoning)
- Enormous pressure not to develop
- Land use planning system "dysfunctional"

- No zoned land available for multi-family housing
- Dramatic "downzoning" as less dense uses allowed
- Market now only accommodates high-end luxury or subsidized housing to serve lower incomes -- not enough housing for middle-class two-wage earner family.
- Tying smart growth to housing need/provision of affordable housing (e.g., in some states, use of low income housing tax credit (LIHTC) program tied to smart growth standards)
- What are statewide/regional growth patterns
- Where do we want to foster growth?
- Examine Audubon Society proposal re: regional housing plans and "housing credits"
- What are other states doing? Can we learn from them?
- What are communities doing re: housing planning (DHCD to provide information on EO 418 housing planning activity for 3/18 meeting)
- Slide show of c. 40B projects (representative of all types of projects) and/or distribution of CHAPA publication "Homes of 40B"